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No. 86-339

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

NATIONAL GYPSUM COMPANY,
UNITED STATES GYPSUM COMPANY, AND
W. R. GRACE & CO.,
Petitioners,

v.

SCHOOL DISTRICT OF LANCASTER, et al.,
Respondents.

BRIEF OF GAF CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
REASONS FOR NOT GRANTING THE WRIT	3
I. IT IS NOT THE PROPER DOMAIN OF THIS COURT TO LEGISLATE A SOLUTION TO PETITIONERS' PERCEIVED PROBLEMS THROUGH AN UNWARRANTED APPLICATION OF RULE 23(b)(1)(B)	3
II. THE PUNITIVE DAMAGE CLAIMS DO NOT SATISFY THE REQUIREMENTS OF RULE 23(b)(1)(B)	7
A. The Record Does Not Support a Rule 23(b)(1)(B) Class	7
B. The Rule 23(b)(1)(B) Class Sought By Petitioners Is Underinclusive	10
C. A Mandatory Class Will Delay Disposition For Defendants Of The Claims of Individual Class Members	12
D. The Required Application of the Varying Laws Of The Fifty States Renders Any Class Inherently Unmanageable	13
III. A MANDATORY CLASS ON THE ISSUE OF PUNITIVE DAMAGES VIOLATES THE FEDERAL ANTI-INJUNCTION ACT	15
CONCLUSION	18
RULE 28.1 STATEMENT	19

TABLE OF AUTHORITIES

CASES: Page

In re Agent Orange Product Liability Litigation, 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied sub. nom. In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858 (2d Cir. 1984), *cert. denied sub. nom. Diamond Shamrock Chemicals Co. v. Ryan*, 465 U.S. 1067 (1984) ... 7, 8, 9

In re Asbestos School Litigation, 104 F.R.D. 422 (E.D.Pa. 1984) 2, 7, 8, 16

Atlantic Coastline RR v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) 15, 17

Califano v. Yamasaki, 442 U.S. 682 (1979) 13

Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565 (6th Cir. 1985), *cert. denied*, U.S. , 106 S. Ct. 3335 (1986) 5

Celotex Corporation v. School District of Lancaster, 55 U.S.L.W. 3114 (U.S. July 30, 1986) (No. 86-140) 2

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 13

In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982), *cert. denied*, 459 U.S. 988 (1983) 7, 16, 17

Fischer v. Johns-Manville Corp., 103 N.J. 643, 512 A.2d 466 (1986) 5, 6

In re Glenn W. Turner Enterprises Litigation, 521 F.2d 775 (3d Cir. 1975) 16, 17

LaMar v. H & B Novelty & Loan Company, 489 F.2d 461 (9th Cir. 1973) 9

In re Northern District of California Dalkon Shield IUD Products Liability Litigation, 693 F.2d 847 (9th Cir. 1982), *cert denied*, 459 U.S. 1171 (1983) 7, 8, 9

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

In re Northern District of California Dalkon Shield IUD Products Liability Litigation, 526 F. Supp. 887 (N.D. Cal. 1981) *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982) *cert. denied*, 459 U.S. 1171 (1983) 8

In re School Asbestos Litigation, 789 F.2d 996 (3d Cir. 1986) 1, 2, 5, 9, 11, 12, 13, 14

Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977) 15, 17

STATUTES

Asbestos School Hazard Detection and Control Act of 1980 20 U.S.C. §§3601-3611 4

Asbestos School Hazard Emergency Response Act of 1986, H.R. 5073 and S. 2083 4

Federal Anti-Injunction Act, 28 U.S.C. §2283 15

Toxic Substances Control Act, 15 U.S.C. §§2601-2629 4

FEDERAL REGULATIONS

40 C.F.R. §763 .100-.119 (1983) 4

COURT RULES

Fed.R.Civ.P. 23(b)(1)(B) .. 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 15, 16, 18

Fed.R.Civ.P. 23(b)(2) 1

Fed.R.Civ.P. 23(b)(3) 2

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

17 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* (3d ed. 1978):

¶4221 16

¶4225 17

¶4226 16

OTHER AUTHORITIES

H.R.Rep. No. 308, 80th Cong., 1st Sess., 1949, pp. A181- A182 16

NEWSPAPER ARTICLES

N.Y. Times, Oct. 2, 1986, at A15, col. 2 4

INTRODUCTION

This brief is submitted by GAF Corporation ("GAF"), a defendant in these class proceedings, in opposition to the petition by defendants National Gypsum Company ("National Gypsum"), United States Gypsum Company ("U.S. Gypsum") and W. R. Grace & Co. ("Grace") for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review that portion of the judgment in *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986), *reh'g denied* (June 2, 1986)[1] which, *inter alia*, vacated the certification by the United States District Court for the Eastern District of Pennsylvania of a mandatory punitive damages class under Fed.R.Civ.P 23(b)(1)(B) and affirmed the district court's denial of a Fed.R.Civ.P. 23(b)(2) class certification. GAF has joined with defendant Celotex Corporation ("Celotex") and a number of other defendants in a brief in opposition to be filed concurrently with this brief ("the opposition brief of certain defendants") to the instant petition.[2] This brief will address certain arguments advanced by petitioners in support of a Rule 23(b)(1)(B) punitive damage class, but not addressed in the opposition brief of certain defendants.

This case involves three diversity of citizenship, product liability suits which have been consolidated in the United States District Court for the Eastern District of Pennsylvania. The named plaintiff school districts seek to represent a nationwide class of school districts to recover costs allegedly associated with the inspection, testing and abatement of a wide variety of asbestos-containing products in school buildings, plus punitive damages, under several legal theories. Over fifty companies including miners, bulk suppliers, brokers, assemblers, manufacturers and distributors have been named

1. On June 2, 1986 the Third Circuit denied petitions for rehearing and rehearing *en banc* from its May 1, 1986 decision.

2. The arguments advanced in that brief are incorporated herein by reference.

as defendants. In its Pretrial Order No. 20, the district court certified both a voluntary class under Fed. R.Civ.P. 23(b)(3) for compensatory damages and a no opt-out "mandatory class" under Fed. R.Civ.P. 23(b)(1)(B) for punitive damages.[3] The United States Court of Appeals for the Third Circuit ("Third Circuit") vacated the 23(b)(1)(B) class but affirmed the 23(b)(3) class.[4] GAF has joined with Celotex and a number of other defendants in a petition for review of the Third Circuit's affirmance of the 23(b)(3) class.[5]

Of the more than fifty defendants in the instant case only three — National Gypsum, U. S. Gypsum and Grace — and not a single plaintiff — seek this Court's review of the Third Circuit's vacation of the Rule 23(b)(1)(B) class. Rule 23(b)(1)(B) permits the certification of a mandatory class where the prosecution of individual actions would create a risk of:

> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Thus, Rule 23(b)(1)(B) permits a court to certify a mandatory class with a no "opt-out" provision to protect *proposed class members* from individual lawsuits that would impair *class members'* ability to protect their interests. Petitioners completely ignore the expressed purpose of this class and attempt to expand it well beyond its confines. Rather than focus on the interests of proposed class members, petitioners call for a "bold procedural response" to insure "fairness" to petitioners.

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3. *In re Asbestos School Litigation*, 104 F.R.D. 422 (E.D.Pa. 1984).

4. *In re School Asbestos Litigation*, 789 F. 2d 996 (3d Cir. 1986), *reh'g denied* (June 2, 1986).

5. *Celotex Corporation v. School District of Lancaster*, 55 U.S.L.W. 3114 (U.S. July 30, 1986) (No. 86-140).

Thus, petitioners do not argue that the writ should be granted, and consequently the Rule 23(b)(1)(B) class reinstated, to protect the interests of purported class members. Rather, petitioners seek to have this Court eschew the real purpose of Rule 23(b)(1)(B) in the name of a "bold procedural response" for a purported "cost-efficient single adjudication" on multiple punitive damage claims "for the same course of conduct." Petition for Writ of Certiorari at 3, 8 and 12 ("Petition"). GAF certainly agrees that there must, and should, be procedural and substantive due process limits on punitive damage awards. Nonetheless, it is neither the function nor purpose of Rule 23(b)(1)(B) to achieve these laudable goals. Rule 23(b)(1)(B) simply is not the only mechanism and, more importantly, is not the proper mechanism to address these goals. Petitioners, other than through naked conclusions, have not demonstrated why this Court, and not other, more appropriate bodies such as Congress, the Environmental Protection Agency, state legislatures and the lower federal and state courts, is necessary to legislate, rather than adjudicate, solutions which are otherwise inappropriate under Rule 23. Thus, the petition for writ of certiorari should be denied as calling for an unnecessary and improper application of Rule 23(b)(1)(B).

REASONS FOR NOT GRANTING THE WRIT

I. IT IS NOT THE PROPER DOMAIN OF THIS COURT TO LEGISLATE A SOLUTION TO PETITIONERS' PERCEIVED PROBLEMS THROUGH AN UNWARRANTED APPLICATION OF RULE 23(b)(1)(B)

In somewhat melodramatic fashion, petitioners point to problems wrought by asbestos litigation and turn to this Court as providing the last great hope, by imploring that "only this court can provide a nationwide solution to a nationwide problem," Petition at 8, through the application of Rule 23(b)(1)(B). This fundamental

premise of the petition is seriously flawed. In fact, in the context of these proceedings, this Court is not the only body, or even the proper body, and a mandatory Rule 23(b)(1)(B) punitive damage class is not the only, or even proper method, to provide a solution to the problems which petitioners perceive as "nationwide": "[n]umerous and conflicting punitive damage claims, . . . [which] threaten to deprive petitioners of their due process right not to be excessively and repeatedly punished." Petition at 9. Rather, Rule 23(b)(1)(B) should be utilized in proper cases only to further the expressed purpose of that very unusual and limited type of class[6] and not as a means to address "punitive damage overkill." Solutions to this problem can and should be addressed by any or all of a wide range of legislative, executive and judicial bodies: Congress, the Environmental Protection Agency, state legislatures, lower federal courts and state courts, and by this Court in an appropriate proceeding.[7] It is not, and should not be, the prov-

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6. Indeed, petitioners ignore the true purpose of Rule 23(b)(1)(B) and focus instead on the argument that a Rule 23(b)(1)(B) class should be certified on the grounds of "fairness" to petitioners.

7. In fact, Congress and the Environmental Protection Agency have acted already on the school asbestos issue. It could be argued that actions taken by the Environmental Protection Agency and Congress, among others, precipitated this litigation. In 1980, the EPA investigated the presence of asbestos in the nation's schools and promulgated proposed regulations pursuant to the Toxic Substances Control Act, 15 U.S.C. §§2601-2629, requiring every public and private school in the country to test for the presence of asbestos in their buildings. 40 C.F.R. §§763.100-.119 (1983). In addition, Congress enacted the Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. §§3601-3611. Moreover, in June of this year, Senate and House subcommittees approved the Asbestos School Hazard Emergency Response Act of 1986 which would require the EPA to set rules and standards for the proper removal and abatement of asbestos in schools. *See* H.R.5073 and S.2083. On October 1, 1986, the House passed H.R.5073. A vote on this bill is pending before the Senate. N.Y. Times, Oct. 2, 1986, at A15, col. 2.

ince of this Court to relax the rigorous standards of Rule 23 or to legislate a special exemption from those standards for asbestos litigation.

Indeed, the Third Circuit, although thoroughly cognizant of procedural and substantive due process concerns raised by the petitioners, vacated the mandatory punitive damage class. In doing so the Third Circuit noted that in *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir. 1985), *cert. denied,* U.S. , 106 S. Ct. 3335 (1986), the Sixth Circuit considered defendant's due process arguments and held that: " ' [a]s a matter of federal constitutional law we believe that the presence of a judicial tribunal before which to litigate the propriety of a punitive damages award provides Johns-Manville with all the procedural safeguards to which it is due.' 776 F.2d at 1571." 789 F.2d at 1004 (App. A-25).[8]

Similarly, in the recent case of *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466 (1986), the New Jersey Supreme Court also considered the punitive damage overkill problem, and the manner in which individual courts could safeguard against this problem. The court conceded that it could not implement nationwide solutions to the problem of multiple claims for punitive damages but concluded that reasonable limits could be imposed on the state level by individual courts. Specifically, the court opined:

> [t]hat does not mean, however, that we cannot institute some controls over runaway punitive damages. . . [T]here should be some limits placed on the total punishment exacted from a culpable defendant. We conclude that a reasonable imposition of those limits would permit a defendant to introduce evidence of other punitive damage awards already

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8. All references to the Appendix ("App.") are to the Appendix to the instant petition.

> assessed against and paid by it, as well as evidence of its own financial status and the effect a punitive award would have.
>
> . . . .
>
> When evidence of other punitive awards is introduced, trial courts should instruct juries to consider whether the defendant has been sufficiently punished, keeping in mind that punitive damages are meant to punish and deter defendants for the benefit of society, not to compensate individual plaintiffs.

103 N.J. at 669, 670, 512 A.2d at 480 (citations omitted).

While lower courts have not acted to provide adequate procedural safeguards to date, they have addressed and will continue to address the very real punitive damage problems in the context of individual cases, which would provide a more appropriate context for review by this Court. Thus, while petitioners' concerns regarding due process limitations on punitive damages are well founded, petitioners fail to demonstrate why Rule 23(b)(1)(B) and only Rule 23(b)(1)(B) provides a solution and is otherwise warranted.[9]

It is therefore submitted that it is not the exclusive or proper domain of this Court to supply a "nationwide solution to a nationwide problem" by relaxing the standards of Rule 23 in order to resolve that problem. The Third Circuit has not, as petitioners contend, erroneously foreclosed the use of Rule 23(b)(1)(B) to resolve due process problems posed by punitive damages. The Third Circuit correctly held that on the basis of the record in the instant case it was improper to certify a mandatory punitive damage class, and petitioners have

9. It must be noted with some significance that while all defendants join in petitioners' concerns regarding due process limitations on punitive damages, only three defendants (petitioners) out of over fifty, believe that this unwarranted extension of Rule 23(b)(1)(B) is the only way to address those concerns.

failed to demonstrate why this Court must act to disturb that holding. The Third Circuit's decision on this point should not be reviewed.

II. THE PUNITIVE DAMAGE CLAIMS DO NOT SATISFY THE REQUIREMENTS OF RULE 23(b)(1)(B)

A. The Record Does Not Support A Rule 23(b)(1)(B) Class

The only three federal appellate courts, including the Third Circuit in the instant case, which have considered Rule 23(b)(1)(B) certification on the issue of punitive damages in the context of mass torts have rejected it. *In re Northern District of California, Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982), *cert. denied*, 459 U.S. 988 (1983). Thus, since there is no conflict among or confusion in the circuits on this issue, review of the petition is unwarranted.

In addition, the Third Circuit properly decided against a 23(b)(1)(B) certification in this case. The district court had ruled that plaintiffs' claim for punitive damages was appropriate for Rule 23(b)(1)(B) treatment because, "[i]t is apparent that there is a substantial *possibility* that early awards of punitive damages in individual cases will impair or impede the ability of future claimants to obtain punitive damages." *In re Asbestos School Litigation*, 104 F.R.D. at 437 (App.A-77) (emphasis supplied).[10]

The district court had adopted the reasoning of Judge Jack B. Weinstein in *Agent Orange*[11] who had

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10. This rationale has been referred to in these proceedings as the "limited generosity" theory.

11. *In re Agent Orange Product Liability Litigation*, 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied sub. nom. In re*

found, using a more rigorous standard, that Rule 23(b)(1)(B) was satisfied because of the "substantial *probability*" that subsequently suing plaintiffs would find their ability to recover punitive damages awards impaired because of due process limits on the amount of times defendants could be punished for their wrongful conduct. 104 F.R.D. at 435 (App. A-72, 73).[12]

At the outset, it is important to note that plaintiffs have no interest in or right to recover punitive damages. Indeed, the sole purpose of punitive damages is to punish and deter the alleged wrongdoer and not to benefit the plaintiff. *See Dalkon Shield.*[13] Accordingly, the school districts do not have the kind of protectable interest that is contemplated by Rule 23(b)(1)(B).

Thus, the district court's mandatory class certification was grounded on the unsupported and irrelevant assumption that potential punitive damage awards might be limited in future individual cases. This conclusion was the product of pure speculation and was without any basis in the record or in law. The Third Circuit observed that the district court had made "no factual findings at all as to the potential amount and scope of punitive damages . . . in sharp contrast to the detailed findings on the subject in *In re Agent Orange Product Liability*

NOTES *(Continued)*

Diamond Shamrock Chemicals Co., 725 F.2d 858 (2d Cir. 1984), *cert. denied sub. nom. Diamond Shamrock Chemicals Co. v. Ryan*, 465 U.S. 1067 (1984).

12. It is significant that Judge Weinstein's conclusion was based, in part, on his finding that "there is a substantial probability that limited punitive damages *may be allowed*." 100 F.R.D. at 728 (emphasis supplied). In the present action, the Third Circuit found that the district court had made no finding as to the likelihood that punitive damages would be awarded against any of the defendants.

13. *In re Northern District of California, Dalkon Shield IUD Products Liability Litigation*, 526 F.Supp. 887, 899 (N.D. Cal., 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

Litigation. . . ." 789 F.2d at 1005, (App. A-25,26) (citations omitted). The Third Circuit found that the "most the district court mustered here was its conclusion that: 'It is apparent that there is a substantial possibility that early awards of punitive damages . . . will impair . . . the ability of future claimants to obtain punitive damages.' " *Id.* The Third Circuit concluded that these bare conclusions "fall short of the mark." *Id.*

The Third Circuit's ruling was eminently justified. If Rule 23(b)(1)(B) could be satisfied in the manner adopted by the district court and now urged by petitioners, *every* class action complaint alleging a claim for punitive damages would automatically satisfy subsection (b)(1)(B). Such a situation cannot have been contemplated by the authors of Rule 23.

Moreover, courts have recognized that a strict standard must be employed to prevent automatic Rule 23(b)(1)(B) certification. In *Dalkon Shield*[14] the Ninth Circuit employed a much more rigorous standard than the "substantial possibility" standard used by the district court below and vacated the certification of a mandatory punitive damages class because the detrimental effect of separate punitive damages awards was not "clearly inescapable." 693 F.2d at 851. The court stated that Rule 23(b)(1)(B) certification would be proper only when "separate punitive damages claims *necessarily* will affect later claims." *Id.* at 852 (emphasis supplied).[15]

Thus, the "substantial possibility" standard employed by the district court in this case suffers from two fatal flaws. First, it is an even weaker standard than Judge Weinstein's "substantial probability" formulation in *Agent Orange* and thereby raises the specter of automatic Rule 23(b)(1)(B) certification in every case in

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14. *In re Northern District of California, Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

15. *See also LaMar v. H & B Novelty & Loan Company*, 489 F.2d 461, 476 (9th Cir. 1973).

which punitive damages are alleged. Second, as found by the Third Circuit, even under the legal standard articulated by the district court, there was no evidentiary foundation or basis for the determination that a possibility exists of potentially limited future punitive damage awards. Accordingly, the Third Circuit was correct in ruling that the requirements of Rule 23(b)(1)(B) have not been met.

B. The Rule 23(b)(1)(B) Class Soug! t By Petitioners Is Underinclusive

Even if the record in the instant case supported the "limited generosity" rationale for mandatory class certification, the present case is inappropriate for a mandatory class treatment because the purported class is underinclusive. This was recognized by the Third Circuit to be a "critical flaw" in the district court's analysis:

> [t]he class certified does not even include all property damage claimants. Claims for repair of municipal buildings, for instance, are omitted, as are those of homeowners.
>
> . . . .
>
> Clearly, however, this aspect of the litigation transcends the nation's classrooms and extends to municipal buildings, homes and other structures.
>
> Far more significant are the tens of thousands of personal injury suits in which punitive damage verdicts have been and continue to be assessed. These claims are satisfied from the same pool of assets to which the school districts now look. If a limit is ever placed on the total punitive damages to be imposed on the asbestos defendants, then that limit probably would apply to all claims whether they arise in property damage or personal injury suits. The school claims would be but a small portion of this total.
>
> . . . .

> Assuming that the record supported the "limited generosity" theory, we would nonetheless decertify the class on the ground that it is underinclusive.

789 F.2d at 1005, 1006 (citations omitted) (App. A-26, 27).

Thus, the Third Circuit reasoned that the class certified by the district court, and now requested by petitioners, was underinclusive, and *would not accomplish what it was certified by the district court to accomplish*, i.e., to insure that the purported class members will share in a limited fund of punitive damages.[16]

Indeed, the Third Circuit concluded that the effect of the mandatory class would be

> to single out the school districts for special and possibly disadvantageous treatment.
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> . . . .
>
> Since the thousands of other claimants who seek exemplary damages from the asbestos defendants need not operate within the confines of a mandatory class procedure, the quest for punitive damages remains for them a race to the courthouse door. Consequently, if the district court proves correct in its theory that at some point a limit on all punitive damages will be established, the school districts may be prejudiced in their opportunity to share in the available funds in the meantime.

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16. Petitioners argue, disingenuously, that the Third Circuit's discussion of the "underinclusiveness" of the proposed Rule 23(b)(1)(B) class has little or no application to petitioners' arguments. Petitioners cleverly ignore the fact that the underinclusiveness issue is very relevant to the primary basis upon which the district court certified the Rule 23(b)(1)(B) class — the "limited generosity" theory. The Third Circuit properly reasoned that the underinclusiveness of the purported class precluded accomplishing the objectives which formed the basis for the district court's certification.

. . . .

> *Certification of a punitive damage class under that provision* [Rule 23(b)(1)(B)] *here will not accomplish these objectives.* In the court's pursuit of an end that is not attainable, the class designed to be protected will be burdened with hardships not imposed on any other litigants.

789 F.2d at 1006 (App. A-29) (emphasis supplied).

It is submitted that the Third Circuit's analysis was proper and that the instant petition should be denied. The district court's reliance upon a "limited generosity" theory to support the proposed mandatory punitive damage class was misplaced. The Third Circuit correctly ruled that that theory was not a proper ground for certifying a mandatory punitive damages class because such a class would be underinclusive.

C. A Mandatory Class Will Delay Disposition For Defendants Of The Claims Of Individual Class Members

There is another reason, recognized by the Third Circuit, militating against the certification of a mandatory punitive damages class. The Third Circuit stated this rationale as follows:

> [a] class action may promote efficiency by reducing repetitive testimony and evidence that otherwise would be required in individual trials. Those advantages, however, are secured at the price of delaying the disposition of individual cases that might be tried to conclusion in a number of state and district courts in the interim. In effect, a mandatory class action creates a bottleneck by concentrating the litigation, at least for a period, before one judge instead of spreading the individual cases out among many trial forums.

789 F.2d at 1007 (App. A-30, 31).

In addition, this Court has recognized that individual case adjudications can be of great value as an alternative to a mandatory nationwide class because:

> nationwide class actions may have a detrimental effect by foreclosing adjudication by a number of different courts and judges, and, of increasing, in certain cases, the pressures on this Court's docket. It often will be preferable to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual contexts. For this reason, a federal court when asked to certify a nationwide class should take care to ensure that nationwide relief is indeed appropriate in the case before it, *and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts.*

Califano v. Yamasaki, 442 U.S. 682, 702 (1979) (emphasis supplied).

Therefore, any theoretical benefit which might flow from having a "single adjudication in a single forum" is completely outweighed by the bottleneck which a mandatory class would create in the Eastern District of Pennsylvania, and the attendant delay caused defendants, as well as all parties, in having these cases heard expeditiously.

D. The Required Application Of The Varying Laws Of The Fifty States Renders Any Class Inherently Unmanageable

The Third Circuit recognized that in diversity cases, courts are bound by *Erie*[17] to apply state substantive law and "the dictates of state law may not be buried under the vast expanse of a federal class action. The parties'

17. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

rights under state substantive law must be respected, and if that is not possible in a class action, then that procedure may not be used." 789 F.2d at 1007 (App. A-31). The Third Circuit reasoned that because the "limited generosity" concept is based upon state law, the lack of uniformity among the states in applying that concept rendered certification improper. On this point the court stated: "[n]othing in the record supports the expectation that a substantial number of states will adopt the "limited generosity" theory in the foreseeable life of this class action. . . A *mandatory class should not be certified on the basis of a prospect so questionable at this time.*" *Id.* (App. A-31, 32) (emphasis supplied).

Moreover, in addition to the uncertainty over the uniform application of the "limited generosity" theory, the court trying the claims of a mandatory punitive damage class in this diversity case would have to evaluate each individual class member's claim for punitive damage in the context of the state punitive damage law applicable to that class member.[18] Consequently, if a "mandatory" punitive damage class is certified, there would be an unmanageable quagmire of thousands of individual claims requiring individual proof. Legal issues and defenses differ from state to state and thus will require lengthy hearings. It is not inconceivable that punitive damages will be determined on a state by state, plaintiff by plaintiff, building by building, defendant by defendant basis. Thus, any purported efficiency to be gained from "a single adjudication of liability in a single forum," would be totally eliminated by the bottleneck that a mandatory class action would create by concentrating the litigation before one judge instead of spreading the individual cases out among many trial courts.

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18. This analysis would have to take place, of course, after the court had resolved any conflicts of law issues as to which state's law to apply to any given claim.

III. A MANDATORY CLASS ON THE ISSUE OF PUNITIVE DAMAGES VIOLATES THE FEDERAL ANTI-INJUNCTION ACT

This Court has stated that the Anti-Injunction Act[19]:

> is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of the three specifically defined exceptions.
>
> . . . .
>
> . . . Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of §2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion.

Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 286, 297 (1970)[20].

There are numerous actions brought by individual school districts now pending in state courts throughout the country which seek punitive damages. Since all school districts would be bound by the Rule 23(b)(1)(B) certification, such a certification would effectively enjoin the litigation of punitive damage claims in all individual actions.

In the only circuit court decision to have considered the interplay of the Anti-Injunction Act and mandatory

19. The Federal Anti-Injunction Act provides:
A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.
28 U.S.C. §2283.

20. *Accord Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630-31 (1977).

class certification, *Federal Skywalk*,[21] the Eighth Circuit vacated a Rule 23(b)(1)(B) class certification as a patent violation of the Anti-Injunction Act because of the pendency of numerous state court actions. The court stated: "the substantial effect of the order also enjoined the state plaintiffs from pursuing their pending state court actions on the issues of liability for compensatory and punitive damages and the amount of punitive damages." *680 F.2d* at 1180.

Precisely the same result is mandated here. The effect of a Rule 23(b)(1)(B) certification is to prevent the various individual plaintiffs from pursuing claims for punitive damages.

The district court below adopted the view of the *Skywalk* dissent in holding that the second of the three statutory exceptions to the Anti-Injunction Act, *i.e.*, the "necessary in aid of jurisdiction" exception, applied to the present case. 104 F.R.D. at 436 (App. A-74).[22]

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21. *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982), *cert. denied*, 465 U.S. 1067 (1984).

22. The other two exceptions are inapplicable to the mandatory class certification urged by petitioners. As to the first of the three exceptions, there is no federal statute "expressly authorizing" the stay of state court proceedings as to punitive damage claims by school districts. Indeed, the Third Circuit held in *In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775 (3d Cir. 1975), that Rule 23 is not an exception to the Anti-Injunction Act. *Id.* at 781.

As to the third exception, certification of a mandatory class is not necessary to protect or effectuate the federal court's judgment. The purpose of this exception is to prevent "relitigation of cases and controversies fully adjudicated by [the federal] courts." H.R. Rep. No. 308, 80th Cong. 1st Sess., 1949, pp. A181-A182. *See* 17 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, §§4221 and 4226 (3d ed. 1978). Since this litigation is in its initial stages, no such danger is present. Further, "[i]t is clear that this [exception] does not permit a federal court to enjoin state proceedings to protect a judgment that the federal court may make in the future but has not yet made." 17 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, §4226 (3d ed. 1978).

This ruling was legal error. This Court has narrowly construed this exception, holding that an injunction may be justified only if it is "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atlantic Coast Line R.R., supra*, 398 U.S. at 295.[23]

Such is not the case here. In fact, this Court specifically held in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977) "that *in personam* actions in federal and state court may proceed concurrently, without interference from either court" in suits involving the same subject matter. [24] *Vendo* is, therefore, fatal to any argument that this case falls within the second exception because this litigation also involves parallel state and federal actions concerning the same subject matter.

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23. *See also In Re Glenn W. Turner, supra*, 521 F.2d at 780; *Federal Skywalk, supra*, 680 F.2d at 1182-83.

24. *See Skywalk, supra*, 680 F.2d at 1182-83; 17 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, §4225 (3d ed. 1978).

CONCLUSION

For the reasons set forth above, the Third Circuit's decertification of a mandatory Rule 23(b)(1)(B) class on the issue of punitive damages should not be disturbed or reviewed and this Court should deny the Petition of National Gypsum Company, United States Gypsum Company and W. R. Grace & Co. for a Writ of Certiorari.

Respectfully submitted,
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RULE 28.1 STATEMENT

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondent makes the following statement disclosing parents, non-wholly owned subsidiaries and affiliates:

GAF Corporation:

None.